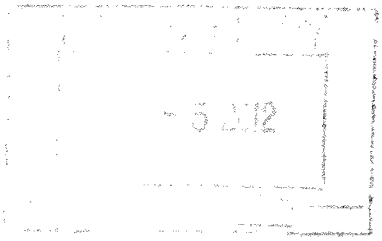
10-5-2012

Sun Sur. Ins. Co. v. District Court of Fourth Judicial Dist. Of State Respondent's Brief Dckt. 39791

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUN SURETY INSURANCE COMPANY, Plaintiff-Appellant, vs. THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO; MICHAEL E. WETHERELL, in his official capacity as Administrative District Judge; LARRY D. REINER, in his official capacity as Trial Court Administrator; and DIANNE BURRELL, in her official capacity as Assistant Trial Court Administrator, Defendants-Respondents.	)	**Supreme Court Case No. 39791**



RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada

Honorable Ron D. Schilling, District Judge, Presiding

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STATEMENT OF THE CASE

This appeal arises from the forfeiture of a bond in a criminal proceeding. It presents a straightforward issue: Whether a bail bond company can seek relief from a bond forfeiture order in an independent civil action after denial of an exoneration motion in the criminal proceeding and failure to appeal from that denial. The material facts are similarly straightforward and undisputed.

I. THE UNDERLYING CRIMINAL PROCEEDING

The State of Idaho filed a criminal complaint on May 8, 2008 in the Fourth Judicial District Court, Ada County, against Elliot Bailey, alleging delivery of a controlled substance in violation of Idaho Code § 37-2732(a) and driving without privileges in violation of § 18-8001(3). R Ex. 5. Bailey executed a notice of court date and bond receipt on May 11, 2008, reflecting a bond amount of $150,000 with the surety agency identified as Best Bail Bonds and the bondsman as Steven K. Ellefson. R Ex. 20.[1] A superseding indictment for violation of § 37-2732(a) was filed five days later. R Ex. 18.

Following Bailey's failure to appear at hearings on October 20 and November 3, 2008, the district court judge presiding over the criminal proceeding declared the bond forfeited. R Ex. 51. The district court clerk forwarded notice of the forfeiture to Best Bail Bonds and Ellefson at the latter's mailing address in Boise on the same date, advising them that "[i]f within one hundred eighty (180) consecutive days from the above date of the order forfeiting bond, you bring said Defendant to the jail facility of the county which issued the warrant, the Court shall direct that the forfeiture be discharged." R Ex. 53.[2] Law enforcement officers apprehended

[1] Sun Surety does business in Idaho through Best Bail Bonds as its "local agent." R p. 24 ¶ 8; *see also* R p. 111 (power of attorney related to bond posted for Bailey issued by Sun Surety).
[2] The clerk's notice was addressed as follows:

Bailey on November 6, 2008. R Ex. 54. He eventually entered into a plea agreement that resulted in entry of a judgment of conviction and sentence for violation of § 37-2732(a) on March 2, 2009. R Ex. 65.

Ellefson did not ignore the forfeiture notice. He filed a motion to set aside the forfeiture and to exonerate bond on January 29, 2009. R Ex. 60. The motion read:

> Steve Ellefson, who heretofore posted the above referenced undertaking of bond of the above-named defendant, said bond having been forfeited by this court, hereby moves this court for an Order setting aside said forfeiture of bail and exonerating the same pursuant to authority set forth in I.C.R. 46(e) on the following grounds: Defendant was arrested and warrant returned prior to the expiration of the ninety day period.

Id.[3] The district court denied the motion on March 12, 2009 "without prejudice for lack of approval by [the Trial Court Administrator's] office." R Ex. 71. On May 1, 2009—178 days after the bond forfeiture order—an attorney for Sun Surety moved to set aside the forfeiture and exonerate the bond under I.C.R. 46(e) and (g). R Ex. 72.[4] The motion identified three grounds for exoneration: (1) "a bench warrant was issued and the bond was forfeited by the Court on

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Best Bail Bonds
Steven K Ellefson
P.O. Box 7985
Boise, ID 83707

R Ex. p. 53. The address entry was taken verbatim from the information supplied on May 11, 2008 in a Notice of Court Date and Bond Receipt. R Ex. p. 20.

[3] The reference in the motion to "the ninety day period" likely was to the immediately preceding codification of Idaho Code § 19-2927 included in Appendix A and in effect at the time of the *Bailey* litigation. Section 19-2927 was amended effective July 1, 2007 to increase the period of time from 90 to 180 days for, *inter alia*, "a person, other than the defendant, who has provided bail for the defendant" to surrender the defendant to law enforcement authorities and thereby exonerate the bail undertaking. 2007 Idaho Sess. Laws ch. 175, § 1. Unless otherwise indicated, all references to provisions in Title 19, Chapter 29 are to its codification as effective on July 1, 2008.

[4] All references to Rule 46 are to its codification as of the period between November 3, 2008 and May 29, 2009. The relevant rule is included in Appendix B.

November 3, 2008, for defendant's failure to appear[;]" (2) "the bench warrant issued for the Defendant's arrest was returned on November 6, 2008, with the defendant having been arrested and in custody[;]" and (3) "the defendant appeared before the Court and was arraigned on November 24, 2008." R Ex. 72-73. The district court denied the motion on May 29, 2009 with this explanation:

> This motion is hereby DENIED without prejudice. Pursuant to I.C. § 19-2927, the Defendant has not appeared within 180 days after failing to appear and satisfactorily excused his neglect; moreover, a person posting the bond has not surrendered the Defendant to a jail facility within 180 days of the Court's entry in the minutes the fact of Defendant's failure to appear.

R Ex. 73. Sun Surety took no further action in the *Bailey* criminal proceeding to challenge the bond forfeiture order.

II. THE CIVIL ACTION BELOW

Sun Surety commenced the proceeding below on November 2, 2010—17 months after the *Bailey* district court denied its second motion to set aside the bond forfeiture. R p. 4. It filed a verified amended complaint on January 5, 2011, alleging in part:

> 9. The Trial Court Administrator was initially notified that the Supervising Agent of Best Bail Bonds was Steve Ellefson and that forfeiture notices should be mailed to him at P.O. Box 7985, Boise, Idaho 83707.
>
> 10. On or about July 2, 2002, the then Trial Court Administrator the Honorable Darla Williamson, District Judge, predecessor to Judge Michael E. Wetherell and Ada County Clerk were notified that, effective June 1, 2003 and after, the Supervising Agent of Best Bail Bonds was amended to be Patrick Wood who was to be given statutory notice of all forfeitures by fax at (605) 348-0778 or by mail to 21 Main Street, Rapid City, South Dakota, 57701. On July 9, 2003, Assistant Trial Court Administrator Burrell replied to said letter noting that Mr. Wood was acknowledged to be the Supervising Agent, but stating that they would mail notices only to the person posting the undertaking of bail, pursuant to the then provisions of Idaho Code Section 19-2927.
>
> 11. Thereafter, however, contrary to the contents of the Burrell letter and consistent

with Mr. Wood's request, forfeiture notices for Best Bail Bonds were properly and regularly mailed by the Ada County Clerk to Patrick Wood in Rapid City, South Dakota at Sun Surety Insurance Company. In 2007, Idaho Code Section 19-2927 was amended to provide that notice of forfeiture was required to be mailed to the person posting the undertaking of bail or his "designated agent".

* * * * *

13. On or about the middle of August, 2008, Steve Ellefson left the employ of Sun Surety Insurance, Inc. On August 21, 2008, Ellefson was appointed a bail agent for Lexington National Insurance, a competitor of Sun Surety Insurance Company. Thereafter, he was no longer a Designated Bail Agent for Sun Surety. The Defendants knew or should have known Ellefson was no longer in authority for Sun Surety.

14. The Trial Court Administrator and the Clerk remained in regular mail communication about Sun Surety forfeitures with Patrick Wood during the months of August, September and October of 2008, continually confirming and informing him of failures to appear as the Surety and Designated Agent for Best Bail Bonds. On October 2, 2008, Defendants Reiner and Williamson sent a form letter to Sun Surety and Wood noting that a statutory change required the Clerk to mail notices of forfeiture of a surety bond to the Surety or its Designated Agent.

R pp. 24-25. The "statutory change" referred to in paragraph 14 of the amended complaint was to the 2007 amendment to § 19-2927 that added the phrase "or, if the bail consists of a surety bond, to the surety or its designated agent" to the end of the first sentence in the section's opening paragraph. 2007 Idaho Sess. Laws ch. 175, § 1.[5]

The amended complaint contained six "causes of action": (1) a declaratory judgment concerning whether, *inter alia*, Sun Surety was "entitled to the exoneration of the Bailey bond because of the Clerk's failure to give Plaintiff the notice of forfeiture mandated by the former

[5] Sun Surety appended one letter between the Trial Court Administrator's office and Ellefson and Patrick Wood related to the former's status as an agent of Sun Surety to an affidavit submitted by its counsel with its memorandum opposing the motion to dismiss. R p. 116 (Sept. 3, 2008 letter from Assistant Trial Court Administrator to Ellefson with copy to Wood concerning Ellefson's authority to post bonds on Sun Surety's behalf). It additionally appended to the affidavit notices of bond forfeitures issued on November 7, 13 and 14, 2008 that were mailed to Wood at his Rapid City address. R pp. 117-19. None of the correspondence referred to in paragraphs 10 and 14 was before the district court.

Idaho Code Section 19-2927 and former I.C.R. 46(a) [*sic*]" (R p. 29 ¶ 34.A); (2) injunctive relief pursuant to I.R.C.P. 65 or through writs of prohibition or mandate against payment under the forfeited bond (R pp. 30-31 ¶ 37); (3) quasi-estoppel (R p. 31 ¶ 40); (4) impossibility of performance because "Plaintiff and its agents were fully capable of locating or attempting to locate Bailey on or before November 6th, 2008 when he was returned to the Court had they received time notice from the Clerk of his failure to appear on November 3rd, 2008" (R p. 32 ¶ 43); (5) "equitable relief" under I.C.R. 46(e)(4) (R p. 32 ¶ 46); and (6) exoneration pursuant to Idaho Code § 19-2922—a statute which became effective on July 1, 2009 but which Sun Surety characterized as procedural (R p. 35 ¶ 53). Sun Surety identified no statute that authorized a right of action other than, arguably, Idaho Code §§ 7-301 to -314 for a writ of prohibition or Idaho Code §§ 7-401 to 404 for a writ of prohibition.

Respondents moved to dismiss under I.R.C.P. 12(b)(6), arguing that "[a]llowing Sun Surety to proceed with a collateral attack now would create an end-run around the normal requirements for challenge by means of a timely direct appeal, undermine the finality of the District Court's [bond forfeiture] judgment, and disregard the law's interest in litigation repose." R p. 64. As such, they contended that the amended complaint was a "quintessential candidate for *res judicata*."[6] After converting the Rule 12(b)(6) motion to a summary judgment proceeding

[6] Respondents also directed more specific arguments to the "causes of action" related to prohibition and relief (R pp. 75-77), quasi-estoppel (R pp. 77-78), impossibility of performance (R pp. 77-80), and the attempted application of § 19-2922 to this proceeding as a "procedural" statute (R pp. 80-81). Sun Surety addresses only the quasi-estoppel "cause of action" in its brief before this Court and therefore must be deemed to have abandoned the other three. *Myers v. Workmen's Auto. Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief. . . . A reviewing court looks to the initial brief on appeal for the issues presented on appeal."); *accord Indian Springs L.L.C. v. Andersen*, No. 38369, 2012 WL 4055340, at *7 (Idaho S. Ct. Sept. 14, 2012); *Jacklin Land Co. v. Blue Dog RV, Inc.*, 151 Idaho 242, 248, 254 P.3d 1238, 1244 (2011).

with Sun Surety's concurrence (R pp. 148, 152-53), the district court agreed that claim preclusion barred the collateral attack. It reasoned that the "same parties" or their privies requirement was satisfied because, "[a]s can be readily observed in numerous Idaho Appellate Court cases, Sureties seek relief regarding surety bond issues in the underlying criminal cases" (R p. 156 Ls. 18-19) and "this Plaintiff and same Defendants in the present suit are the Parties who would have been involved in . . . [exoneration] motions" (R p. 157 Ls. 3-4). As to the "same claim" requirement, the court stated that Sun Surety's contention that "it is entitled to exoneration because the Clerk failed to give proper notice pursuant to the former Idaho Code § 19-2927" (R p. 157 Ls. 13-14) and the attendant "causes of action" could not evade "[t]he reality that neither [Sun Surety], nor I, can overcome is that these 'matters . . . might and should have been litigated' before [the Bailey criminal case judge]" (R p. 157 Ls. 21-23). The "final judgment" requirement existed given settled authority that "[a] trial court's order denying exoneration of a bail bond is a final order under I.A.R. 11(a)(1)" and the court's view that that "[t]here is no distinction made [in such authority] as to whether or not the order is without prejudice." R p. 159 Ls. 7-10.

ISSUES PRESENTED

I. Whether Sun Surety possessed a private right of action to challenge the *Bailey* court's bond forfeiture in an independent civil action.

II. Whether Sun Surety's action was barred by claim preclusion.

III. Whether Respondents are entitled to attorney fees on appeal.

STANDARD OF REVIEW

This Court "applies the same standard as the district court when ruling on a motion for summary judgment." *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011). Under that standard,

> [s]ummary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." . . . The movant has the burden of showing that no genuine issues of material fact exist. . . . Disputed facts and reasonable inferences are construed in favor of the nonmoving party.

Id. (citation omitted). It is equally settled that the Court may affirm on any ground that supports the judgment. *E.g.*, *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 580, 850 P.2d 724, 731 (1993) ("where an order of the district court is correct but based upon an erroneous theory, this Court will affirm upon the correct theory").

ARGUMENT

I. NO RIGHT OF ACTION EXISTS TO CHALLENGE A BOND FORFEITURE ORDER IN AN INDEPENDENT CIVIL PROCEEDING

This Court has made clear that "[t]he right to relief from forfeiture of bail is governed by statute" and that, under the statutes applicable at the time of the forfeiture here, the "right to relief is governed by I.C. § 19-2927." *State v. Overby*, 90 Idaho 41, 44, 408 P.2d 155, 156 (1965) (citing *State v. Mayer*, 81 Idaho 111, 114, 338 P.2d 270, 272 (1959)). Section 19-2927 as then codified provided, *inter alia*, that "'if at any time within twenty days after [the forfeiture order's] entry in the minutes, the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just.'" *Id.* Because the surety made application for the forfeiture's exoneration outside the twenty-day period, its "motion came too late to secure the relief requested." *Id.* The import of *Overby* to this matter is plain: Sun Surety must point to a specific statutory provision authorizing it to maintain an independent civil action to seek exoneration of the *Bailey* district court's forfeiture order. It identifies no such statute, and that failure dooms challenge to the order.

The conclusion dictated by *Overby* and the earlier decided *Mayer* comes as no surprise. Myriad appellate decisions have addressed the propriety of bond forfeitures.[7] Regardless of the outcome, they share the common procedural characteristic of being appeals under I.A.R. 11(a)(1) from the criminal proceeding's district court ruling. The exclusivity of the direct appeal process derives not only from the absence of any statutorily created right of action but also from the very practical consideration that what is being reviewed is the exercise of discretion by the district court. *See, e.g.*, *Two Jinn*, 151 Idaho at 728, 264 P.3d at 68 ("[t]he determination of whether to set aside the forfeiture of a bail bond under former I.C.R. 46(e)(4) is committed to the discretion of the trial court and will not be overturned absent a finding that the trial court abused its discretion"). An independent proceeding displaces this Court's highly circumscribed review role and the deference owed to the criminal proceeding judge's determination by allowing another district court judge to address the exoneration issue *de novo*—a significant modification to the scope of judicial authority. *See City of Osborn v. Randal*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) (overruling decisions that applied *de novo* standard to review awards of attorney fees under Idaho Code § 12-117, and applying abuse of discretion standard); *State v. Shutz*, 143 Idaho 200, 202, 141 P.3d 1069, 1071 (2006) ("[t]he question of whether evidence is relevant is reviewed *de novo*, while the decision to admit relevant evidence is reviewed for an abuse of discretion"); *State v. Page*, 135 Idaho 214, 218, 16 P.3d 890, 894 (2000) (applying *de novo* and

[7] *E.g.*, *State v. Two Jinn, Inc.*, 151 Idaho 725, 264 P.3d 66 (2011); *State v. Rupp*, 123 Idaho 1, 843 P.2d 151 (1992); *State v. Two Jinn, Inc.*, 148 Idaho 874, 230 P.3d 766 (Ct. App. 2010); *State v. Two Jinn, Inc.*, 148 Idaho 752, 228 P.3d 1019 (Ct. App. 2010); *State v. Castro*, 145 Idaho 993, 188 P.3d 935 (Ct. App. 2008); *State v. Quick Release Bail Bonds*, 144 Idaho 651, 167 P.3d 788 (Ct. App. 2007); *State v. Vargas*, 141 Idaho 485, 111 P.3d 621 (Ct. App. 2005); *State v. Abracadabra Bail Bonds*, 131 Idaho 113, 952 P.2d 1249 (Ct. App. 1998); *State v. Plant*, 130 Idaho 130, 937 P.2d 442 (Ct. App. 1997); *State v. Fry*, 128 Idaho 50, 910 P.2d 164 (Ct. App. 1994).

abuse-of-discretion standards with respect to application of I.R.E. 609(a)). In practical and legal effect, therefore, Sun Surety's action substitutes the statutory process for contesting a forfeiture order—a motion under § 19-2927 filed within 180 days of the forfeiture order's entry into the minutes for resolution by the judge presiding over the criminal action—and invests a district court with greater decision-making authority than this Court possesses.

Instructive on the exclusivity of the statutory bond procedures and the obligation to comply with its time limits are the Court of Appeals' decisions in *Abracadabra* and *Vargas*. The former arose from a prosecuting attorney's enforcing a bond forfeiture through a contempt motion rather than under the statutory procedure specified under the-then applicable codification of Idaho Code § 19-2928. That procedure "authorize[d] the state to enforce a bond forfeiture through a civil action." *Abracadabra*, 131 Idaho at 120, 952 P.2d at 1256. The Court reversed, holding initially that the surety's relationship with the State was contractual in nature and that "[t]he contempt power . . . is generally not available for the enforcement of contracts between parties and money judgments." 131 Idaho at 119, 952 P.2d at 1255. The prosecuting attorney's remedy instead lay "in a separate civil action" under § 19-2928. It then turned to the question whether the statutory right of action superseded the common law writ of *scire facias*. The Court answered that question in the affirmative:

> Idaho has abolished the writ of *scire facias*. . . . Idaho, however, has authorized the enforcement of a surety's obligation by motion, but in areas not including bail bonds. . . . [¶] In addition to I.C. § 19-2928, Idaho Criminal Rule 46 governs bail bond forfeiture and enforcement. Rule 46 is silent, however, with respect to enforcing a bond forfeiture without the necessity of an independent action. . . . Therefore, there is no provision in the Idaho Code or the Idaho Criminal Rules authorizing the enforcement of a bail bond forfeiture without the necessity of an independent action. Accordingly, once proper notice is given and a surety fails to remit the forfeited bond, the prosecuting attorney may proceed under I.C. § 19-2928 for enforcement of the forfeited bond.

131 Idaho at 120, 952 P.2d at 1256 (citations omitted). *Abracadabra* exemplifies the principle

that the statutory bail bond provisions, as complemented by the Idaho Rules of Criminal Procedure, control the remedies available upon bond forfeiture.

A major issue in *Vargas* was the surety's claim that the district court abused its discretion by not extending the then 90-day period under § 19-2927 for the defendant to appear or be brought before the court for purposes of a forfeiture order's rescission. The Court of Appeals rejected the claim because the statute did not accord the district court the authority to extend the period:

> Section 19-2927, as quoted above, directs the court to exonerate forfeiture if the defendant appears within ninety days of the forfeiture. The statute further provides that the court may *set aside* the forfeiture and reinstate the bond if done prior to remittance of the forfeiture and with written consent of the person posting the bond. However, Section 19-2927 does not provide for an *extension* of the ninety days nor does it list any exceptions and, thus, the statute does not confer upon a court authority to extend the time specifically described by the statute. [¶] Additionally, I.C. § 19-2928, which governs enforcement of the forfeiture, provides that if the forfeiture is not discharged, the prosecuting attorney may, "at any time after ninety (90) days" from the forfeiture, proceed to recover against the forfeited bail. It is clear from that statute that the legislature anticipated ninety days as the time for enforcement of the bond forfeiture.

141 Idaho at 488, 111 P.3d at 624. *Vargas* thus underscored that the period specified in § 19-2927 for the defendant's appearance or production was fixed and not subject to modification. Although 2007 Idaho Session Laws Chapter 175 doubled the period under §§ 19-2927 and -2928, the Court's reasoning loses none of its force and dictates that Sun Surety possessed only 180 days to seek exoneration before the *Bailey* court and that thereafter the forfeiture was subject to enforcement. Allowing the surety to maintain an independent action attacking the forfeiture vitiates the detailed and mandatory procedure created by the Legislature under §§ 19-2927 and -2928.

Sun Surety's arguments below and before this Court established no basis to overwrite the bail bond statute's exclusivity and to recognize an independent action of the sort here. As noted

above, it advanced mandamus and prohibition "causes of action" in its amended complaint but understandably has abandoned them on appeal. Neither of those remedies is available where "a plain, speedy and adequate remedy in the ordinary course of law" exists (§§ 7-303 and 7-402), and the procedure in § 19-2927 indisputably provided just such remedy. Two of the "causes of action" were remedial devices premised upon the existence of a substantive right of action.[8] Two others were affirmative defenses.[9] The remaining "causes of action" sought relief unavailable outside the *Bailey* criminal proceeding context.[10] Sun Surety, in sum, failed to

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[8] The request for injunctive relief under Rule 65 and a declaratory judgment was so premised. Other jurisdictions also have held that the Uniform Declaratory Judgment Act has no play, even when a right of action exists, where a legislature has provided an exclusive remedial scheme to adjudicate an entitlement to the asserted right. *See, e.g., Cont'l W. Ins. Co. v. Farm Bureau Ins. Co.*, 511 N.W.2d 559, 562 (Neb. Ct. App. 1994) ("[a]ctions for declaratory judgment are not to be entertained where another equally serviceable remedy has been provided by law, nor are they to be used to create new causes of action or cumulative remedies"); *Nat'l Capital Park and Planning Comm'n v. Wash. Nat'l Arena*, 386 A.2d 1216, 1222 (Md. 1978) ("where a specific statutory remedy is available, it is mandatory for the court to dismiss the suit for declaratory judgment and remit the plaintiff to the alternative forum"); *Nelson v. Knight*, 460 P.2d 355, 371-72 (Ore. 1969) ("'it is neither useful nor proper to issue the declaration'" where, *inter alia*, "'a special statutory remedy has been provided'") (quoting Edwin M. Borchard, *Declaratory Judgments* 302 (2d ed. 1941)).

[9] Quasi-estoppel, to which Sun Surety devotes substantial attention before this Court (Br. Appellant 11-14), is a commonly pled affirmative defense, not a substantive claim for relief. *E.g., First Fed. Sav. Bank v. Riedsel Eng'g, Inc.*, No. 38407-2011, 2012 WL 4450898 (Idaho S. Ct. Sept. 14, 2012); *C & G, Inc. v. Canyon Highway Dist.*, 139 Idaho 140, 144-45, 75 P.3d 194, 198-99 (2003); *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 48 P.3d 1241 (2002). The same is true with respect to impossibility of performance—an affirmative defense in the breach of contract context. *E.g., Thorn Creek Cattle Ass'n v. Bonz*, 122 Idaho 42, 43, 830 P.2d 1180, 1181 (1992); *Brand S Corp. v. King*, 102 Idaho 731, 733, 639 P.2d 429, 431 (1981); *see also State v. Two Jinn, Inc.*, 151 Idaho 725, 728-29, 264 P.3d 66, 69-70 (Ct. App. 2011) (examining impossibility of performance claim in bail forfeiture appeal under settled contract principles).

[10] Sun Surety argues in its opening brief that "[a] Rule 46(e)(4) hearing could even take place with the *State v. Bailey* case before Judge Neville, should this Court order one." Br. Appellant 17. Not unexpectedly, it cites no precedent for this Court, much less the district court below, to reopen the *Bailey* proceeding. In another now abandoned theory, Sun Surety

establish a right to maintain an independent suit for the purpose of challenging the *Bailey* bond forfeiture.

II. CLAIM PRECLUSION BARS SUN SURETY'S ACTION

A. Overview of *Res Judicata* Principles

This Court's modern precedent establishes that, "[a]lthough the literal definition of the term 'res judicata' is expansive enough to cover both preclusion of relitigation of the same cause of action and relitigation of the same issue, the modern tendency is to refer to the aspect of the doctrine that precludes relitigation of the same issue in a separate cause of action as 'collateral estoppel,' and to refer to that aspect preventing relitigation of the same cause of action as 'res judicata.'" *Rodriguez v. Dep't of Correction*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001). The elements of claim preclusion, or true *res judicata*, and issue preclusion, or collateral estoppel (*Peterson v Private Wilderness, LLC*, 152 Idaho 691, 695, 273 P.3d 1284, 1288 (2012)), and the differing reach of the two preclusion categories have been summarized in multiple Idaho cases.

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asked the district court to exonerate the forfeiture under a provision of Title 19, Chapter 29 that became effective on July 1, 2009 on the premise that the new statute was procedural in character and therefore retroactive. R pp. 35 ¶ 53 and 100-101. As with the Rule 46(e)(4) claim, it identified no basis for the district court to apply the bail bond statute provision.

Sun Surety also now suggests that relief under I.R.C.P. 60(b) supplies "a narrow window for the consideration of relief in Idaho." Br. Appellant 22-23. This issue was not raised below and thus is barred procedurally. Beyond that lethal procedural defect, the surety offers no authority for the proposition that the Idaho Rules of Civil Procedure apply to bond forfeiture proceedings or, even if they do, that Rule 60(b) authorizes "an *action* for independent equitable relief." Br. Appellant 23 (emphasis added). The rule itself prefaces the grounds for relief with the phrases "[o]n *motion* and upon such terms as are just[.]" I.R.C.P. 60(b) (emphasis added); *see generally* Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2865 (2d ed. Westlaw Sept. 2012 Database) ("[r]elief under Rule 60(b) ordinarily is obtained by motion in the court that rendered the judgment"). Sun Surety's reliance on dicta in *State v. Peterson*, 153 Idaho 157, 165, 280 P.3d 184 (Ct. App. 2012), is inapposite (Br. Appellant 23-24); the relief requested there was brought by motion before the district court that issued the involved order.

With respect to claim preclusion, this Court has explained:

> In order for claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) a valid final judgment.... Claim preclusion generally bars adjudication not only on the matters offered and received to defeat the claim, but also as to matters relating to the claim which might have been litigated in the first suit.

Wernecke v. St. Maries Jnt. Sch. Dist., 207 P.3d 1008, 1019 (Idaho 2009) (citation omitted).

Issue preclusion is attended by more factors and a less expansive substantive reach:

> [F]ive factors must be evident in order for collateral estoppel to bar the relitigation of an issue determined in a prior proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Rodriguez, 136 Idaho at 93, 29 P.3d at 404; *see also Stoddard v. Hagadone Corp.*, 147 Idaho 186, 190-91, 207 P.3d 162, 166-67 (2009) (distinguishing claim and issue preclusion); *Waller v. State Dep't of Health and Welfare*, 146 Idaho 234, 238, 192 P.3d 1058, 1062 (2008) (same). The Court has adopted the *Restatement (Second) of Judgments* formulation for determining "finality" in the issue preclusion context: "[F]or purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue that is determined to be sufficiently firm to be accorded preclusive effect." *E. Idaho Agric. Credit Ass'n v. Neibaur*, 133 Idaho 402, 408, 987 P.2d 314, 320 (1999) (quoting *Restatement (Second) of Judgments* § 13 (1982)) (some internal quotation marks omitted); *accord Rodriguez*, 136 Idaho at 94, 29 P.3d at 405.[11] Claim preclusion exists here.

[11] Comment g to § 13 of the *Restatement* counsels that, while ordinarily it is unnecessary to adopt a "finality" date for claim-preclusion purposes that differs from the date of the final judgment,

B. Application of Claim Preclusion Requirements

1. Same Party Requirement

A fundamental principle with respect to surety undertakings of the type here must be emphasized in determining whether the same party requirement is satisfied here:

> A bail bond agreement is a suretyship contract between the state on one side and an accused and his or her surety on the other side, whereby the surety guarantees the appearance of an accused. . . . The extent of the surety's undertaking is determined by the bond agreement and is subject to the rules of contract law and suretyship.

Castro, 145 Idaho at 996, 188 P.3d at 938 (citation omitted). Implicit in the contractual nature of bail bond agreements is that any disputes over their application or enforcement are between the parties and intended beneficiaries. The necessary consequence is that, no matter how captioned, the real parties in interest presently are the State and Sun Surety, with Ada County as the

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> [b]ut to hold invariably that that kind of carry-over is not to be permitted until a final judgment in the strict sense has been reached in the first action can involve hardship—either needless duplication of effort and expense in the second action to decide the same issue, or, alternatively, postponement of decision of the issue in the second action for a possibly lengthy period of time until the first action has gone to a complete finish. In particular circumstances the wisest course is to regard the prior decision of the issue as final for the purpose of issue preclusion without awaiting the end judgment. . . . Before doing so, the court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion. The test of finality, however, is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision.

The Reporter's Note to Comment g adds that the comment "is new and builds upon decisions in the Second Circuit[,]" including *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80 (2d Cir. 1961). The Note then quotes favorably the "finality" standard adopted by the *Lummus* court: "'Finality in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court really has no good reason for permitting it to be litigated again." *Id.* at 89.

beneficiary of any forfeited bail amounts. *See* § 19-2928 ("[i]f the forfeiture is not discharged, as provided in the last section, the prosecuting attorney may, at any time after one hundred eighty (180) days from the entry upon the minutes, as provided in the last section, proceed by action in the name of the county, against the bail upon their undertaking"). The issue therefore is whether Sun Surety can negate the privity requirement by naming as defendants the Fourth Judicial District Court and various individuals in their official state capacities. So posing the question effectively answers it.

Plainly enough, Sun Surety and the State were parties to the bond forfeiture proceedings in the *Bailey* criminal action. The surety specifically alleged that it "caused two exoneration motions to be presented to the *Bailey* court asking for equitable relief from the forfeiture" of the bond, while the State was the plaintiff. R p. 27 ¶ 23; Idaho Code § 19-104 ("[a] criminal action is prosecuted in the name of the state of Idaho, as a party, against the person charged with the offense"). Its exoneration motion, moreover, sought to affect the County's entitlement to the bail amount. This is enough for claim preclusion purposes. *Ticor Title Co. v. Stanion,* 144 Idaho 119, 126, 157 P.3d 613, 620 (2007) (entity constitutes a "party" for claim preclusion purposes if it "was the subject of noticed motions and hearings that directly affected its interests").

The individually named officials were no less plainly in privity with the State. *First*, their only interests derive from their status as Judicial Branch officials or employees; they have no other "dog in the fight." *See, e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403 (1940) ("[t]here is privity between officers of the same government so that a judgment in a suit between a party and a representative of the [government] is res judicata in relitigation of the same issue between that party and another officer of the government"); *Gikas v. Zolin*, 863 P.2d

745, 863-65 (Cal. 1993) (different governmental entities were in privity).[12] *Second*, the State acted through the individual Respondents to implement Title 19, Chapter 29 and, more generally, to preserve the integrity of the criminal process. *See Two Jinn,* 148 Idaho at 755, 228 P.3d at 1022 ("the primary purpose of a bail bond agreement . . . is to effectuate the defendant's presence in court to answer the charges brought by the state."). In communicating with Sun Surety about its bond, the individual Respondents promoted Sun Surety's adherence to the alleged bond agreement and thereby furthered the State's interest in effective law enforcement. And in opposing Sun Surety's claims now, the individual Respondents raise arguments no different than those that the State would raise if it were the named defendant. The first requirement for claim preclusion is therefore satisfied. *See Ticor Title Co.*, 144 Idaho at 124, 157 P.3d at 618.

2. Same Claim Requirement

Claim preclusion "bars adjudication . . . as to every matter which might and should have been litigated in the first suit." *Ticor Title Co.*, 144 Idaho at 126, 157 P.3d at 620 (quotation marks and citation omitted). "In other words, when a valid, final judgment is rendered in a proceeding, it extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose." *Id.* Because the concept of a claim is "broad," claim preclusion "may apply even where there is not a substantial overlap between the theories

[12] Respondent Wetherell's position as the Fourth Judicial District Administrative Judge is a statutorily created component of the Judicial Branch. Idaho Code § 1-907. Respondents Reiner and Burrell, in their capacities as Trial Court Administrator and Assistant Trial Court Administrator, are employees of the Judicial Branch. Although named as a defendant, the Fourth Judicial District is a geographical area and thus arguably not a juridical entity capable of suit. Idaho Code §§ 1-801 and -805; *see Two Jinn, Inc. v. District Court*, 150 Idaho 647, 649, 249 P.3d 840, 842 (2011). However, even if subject to suit, the District would simply be an administrative subdivision of the Judicial Branch—and hence the State.

advanced in support of a claim, or in the evidence relating to those theories." *Id.* As this Court reiterated in *Knox v. State*, 148 Idaho 324, 223 P.3d 266 (2010), claim preclusion controls "[n]ot only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any admissible matter which might have been offered for that purpose." 148 Idaho at 338, 223 P.3d at 290 (citing *Nevada v. United States*, 463 U.S. 110, 129-30 (1983)).

No dispute exists that the claim before the *Bailey* district court was the same as the one advanced in the amended complaint: whether the bond forfeiture should be set aside and exoneration ordered. While there is no allegation that Sun Surety's earlier motions involved a claim about inadequate notice of Bailey's failure to appear and bond forfeiture, it is apparent that this claim arose out of the same "transaction or series of transactions" as the earlier claims for exoneration: The bond was the same; the criminal defendant was the same; the underlying criminal case was the same; the surety was the same; the requested relief was the same; and the lack of notice claim could have been raised.

On the last point, Sun Surety had ample opportunity in the earlier case to argue for exoneration on the basis of inadequate notice. The amended complaint alleged that the surety first learned of the failure to appear and bond forfeiture in approximately March 2009 (R p. 27 ¶ 22) but also alleges that it filed the two exoneration motions "thereafter" (R p. 27 ¶ 23). The first motion, however, was filed on January 28, 2009 on its behalf by Ellefson—thereby establishing that it had notice of the forfeiture substantially before March 2009. R Ex. 59. Even if this effective admission of pre-March 2009 knowledge was ignored, Sun Surety knew of the allegedly delayed nature of the forfeiture notice when it moved for exoneration on May 1, 2009. R Ex. 72. With both knowledge of relevant facts and ample opportunity to argue them before the *Bailey* court, Sun Surety *could* have sought exoneration on the basis of inadequate notice prior to the end of the 180-day period specified in § 19-2927—the test for a full and fair opportunity to

litigate a claim fully. *Bach v. Bagley*, 148 Idaho 784, 795, 229 P.3d 1146, 1157 (2010); *Rodriguez*, 136 Idaho at 92, 29 P.3d at 403.

3. Final Judgment Requirement

Section 19-2927 imposed a 180-day filing obligation on exoneration requests. The statute granted district courts no authority to extend that filing period. *Vargas*, 141 Idaho at 488, 111 P.3d at 624. The *Bailey* district court accordingly possessed the power to deny Sun Surety's first exoneration motion on March 12, 2009 "without prejudice" because the filing period had not elapsed and the motion could be renewed within 180 days as of the November 3, 2008 forfeiture order. Its denial of the May 1, 2009 motion on May 29, 2009, however, was entered substantially after the 180-day period concluded and thus was "final" as a matter of law, notwithstanding the "without prejudice" proviso.

The decision in *Quick Release Bail Bonds* does not counsel a different conclusion. There, Court of Appeals relied upon the first sentence in Rule 46(e)(4) for the proposition that a district court has authority to grant a motion seeking exoneration at any time before "remittance of the forfeiture." 144 Idaho at 654, 167 P.3d at 791. In so holding, the Court distinguished *Vargas* because the untimely motion in that case was directed not to exoneration but to an extention of time to return the defendant to Idaho. *Id.* The validity of Rule 46(e)(4)'s first sentence, as well as the Court of Appeals' construction of it, is suspect. *First*, the third paragraph of § 19-2927—from which the first sentence in Rule 46(e)(4) presumably derived—authorized a court, "before remittance of the forfeiture," only to "set aside the forfeiture and *reinstate* the undertaking of bail or money deposited instead of bail" so long as "the person posting the same" consents in writing. (Emphasis added.) The third paragraph did not permit a court to *exonerate* the bail undertaking. *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) ("The interpretation of a statute 'must begin with the literal words

of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.'"). Instantly, Sun Surety's bond neither was nor could have been reinstated since the *Bailey* court set a new bond amount—$500,000—at the time the Sun Surety bond was forfeited. R Ex. p. 51. *Second*, Rule 46(e)(4)'s first sentence cannot be squared with the remainder of § 19-2927 that unambiguously establishes a 180-day period for the defendant to appear and to seek exoneration. That period is a substantive requirement not subject to modification by rule. *Cf. Two Jinn,* 150 Idaho at 654-55, 249 P.3d at 847-48 (affirming invalidation of Trial Court Administator's guideline that required bail-related documents to be signed by the bail agent, the superivising agent or the agent's attorney, and reasoning that while "[s]ome judges express frustration as to how long after forfeiture it takes the bail bond agent to locate the defendant and return him or her to court[,] [t]he legislature has set that time at 180 days, Idaho Code § 19-2927(5), which is a substantive statute, not simply procedural"). The 180-day requirement in § 19-2927 for the defendant, or his surety, to appear and to satisfactorily excuse his neglect is no less substantive than the 180-day requirement in Idaho Code § 19-2922(5) as codified in the 2009 amendments to Title 19, Chapter 29.

After the May 29, 2009 motion denial, therefore, Sun Surety's sole remedy was an appeal under I.A.R. 11(a)(2). The surety elected not to appeal for reasons that it is at a loss to explain. Br. Appellant 22. An unappealed order denying exoneration satisfies the final judgment requirement and, when the other elements of issue preclusion exist, bars a later suit on the underlying claim. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been

wrong or rested on a legal principle subsequently overruled in another case.") (citations omitted); *C Sys., Inc. v. McGee*, 145 Idaho 559, 563, 181 P.3d 485, 489 (2008) (applying claim preclusion on the basis of an unappealed summary judgment in prior case); *Gerken v. Davidson Grocery Co.*, 50 Idaho 315, 320, 296 P. 192, 193 (1931) (prior "judgment unappealed from stands as a solemn adjudication as to all the parties thereto, and it cannot now be attacked collaterally, unless void on its face, except for fraud").

III. ATTORNEY FEES SHOULD BE AWARDED UNDER I.A.R. 41(a) AND IDAHO CODE § 12-121

"This Court awards attorney fees on appeal pursuant to I.A.R. 41(a) and I.C. § 12-121 when it is 'left with an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation.'" *Berkshire Invs., LLC v. Taylor*, 153 Idaho 73, 87, 278 P.3d 943, 957 (2012) (quoting *Durrant v. Christenson*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). On appeal, Sun Surety has advanced a potpourri of theories—including the arguments that (1) § 19-2927 is "nearly self-executing" (Br. Appellant 10); (2) the alleged lack of proper notice creates an "equitable bar" (*id.* 11 (capitalization removed)) to the bond forfeiture; (3) a hearing under I.C.R. 46(e)(4) should be directed (*id.* at 17); (4) the *Bailey* district court's May 29, 2009 order did not give rise to claim preclusion (*id.* 17-22); and (5) relief under I.R.C.P. 60(b) is available (*id.* at 22-24). Of these arguments, only the second and fourth were raised below.

With respect to the issues that it did present below, Sun Surety offered no decisional support for the proposition that quasi-estoppel provides a basis for an independent civil suit to challenge a bond forfeiture order. Its claim preclusion analysis asks this Court to accept the propositions that Respondents—all of whom are either the State itself or state officers and employees sued in their official capacities—are not in privity with the State; that the claim

before the district court below was not the claim before the *Bailey* district court notwithstanding the fact that both sought exoneration of the bond forfeiture; that it was not provided a meaningful opportunity to litigate its lack-of-notice claim even though nothing prevented it from advancing it in either or both of the exoneration motions filed on its behalf; and that the May 29, 2009 order was not "final" merely because the *Bailey* court denied it "without prejudice." On the last of those claim preclusion elements, Sun Surety fails to address the express requirement in § 19-2927 that it appear before the *Bailey* court within 180 days to satisfactorily excuse its neglect and that, once the 180-day period expired, the May 1, 2009 motion's denial necessarily became final. Most fundamentally, however, the surety failed to establish any plausible basis for an entitlement to maintain an independent civil action to challenge a bond forfeiture subject to Title 19, Chapter 27. This appeal is "without foundation."

CONCLUSION

The district court judgment should be affirmed.

DATED this 5th day of October 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: _____
CLAY R. SMITH
Deputy Attorney General
Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October 2012, I caused to be served two true and correct copies of the foregoing by the following method to:

David H. Leroy
Attorney at Law
P.O. Box 193
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☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Facsimile:
☐ Email:

CLAY R. SMITH
Deputy Attorney General

APPENDIX A

IDAHO CODE §§ 19-2927 AND -2928 (2008)

IDAHO CODE § 19-2927 (2008)

Forfeiture of bail

If, without sufficient excuse, the defendant fails to appear before the court upon any occasion when his presence has been ordered the court must immediately direct the fact to be entered upon its minutes, order the forfeiture of the undertaking of bail, or the money deposited instead of bail, as the case may be, and order the issuance of a bench warrant for the arrest of the defendant. The clerk shall mail written notice within five (5) days of the forfeiture for failure to appear to the last known address of the person posting the undertaking of bail or, if the bail consists of a surety bond, to the surety or its designated agent. A failure to give timely notice shall exonerate the bail or undertaking. If at any time within one hundred eighty (180) days after such entry in the minutes, the defendant appears and satisfactorily excuses his neglect, the court shall direct the forfeiture of the undertaking or the deposit to be exonerated.

If within one hundred eighty (180) days of the date of forfeiture, a person, other than the defendant, who has provided bail for the defendant, surrenders the defendant to the jail facility of the county which issued the warrant, the undertaking of bail or deposits are thereby exonerated.

The court which has forfeited the undertaking of bail, or the money deposited instead of bail, may, before remittance of the forfeiture, and with the written consent of the person posting the same, set aside the forfeiture and reinstate the undertaking of bail or money deposited instead of bail.

IDAHO CODE § 19-2928 (2008)

Enforcement of forfeiture

If the forfeiture is not discharged, as provided in the last section, the prosecuting attorney may, at any time after one hundred eighty (180) days from the entry upon the minutes, as provided in the last section, proceed by action in the name of the county, against the bail upon their undertaking.

APPENDIX B

I.C.R. 46(e) AND (g) (EFFECTIVE JULY 1, 2007)

I.C.R. 46(e) and (g) (Effective July 1, 2007)

(e) **Forfeiture and enforcement of bail bond.** The court which set amount of a bail bond may order the forfeiture and enforcement of the bond in any of the following manners:

(1) In the event a defendant fails to appear before the court at the time required as a condition of bail, and the court finds that such failure without sufficient cause, or where no evidence is presented which will provide sufficient cause, the court shall immediately ex parte forfeit bail and issue a bench warrant for the defendant.

(2) Upon a verified application of the prosecuting attorney alleging a person has willfully violated conditions of the person's release on other than failure to appear, the court may issue a warrant directing the person be arrested and brought before the court for hearing, or the court may order the person to appear before the court at a time certain.

(3) Upon a bail revocation hearing, at which the defendant shall appear if the person can be found, if the court finds that there has been a breach of conditions of bail, and if the defendant is present before court, it may revoke the bail and remand the bailed person to the custody of the sheriff, and may at any time thereafter reconsider the issue of and may set new bail and impose other additional conditions.

(4) The court which has forfeited bail before remittance of the forfeiture may direct that the forfeiture be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. If the court sets aside the forfeiture, it may, with the written consent of the person posting the bail, reinstate the bail, or the court may exonerate the bail, or the court may recommit the defendant to the custody of the sheriff and set new bail or may release the defendant on his or her own recognizance. The court shall give written notice to the person posting the bail or, if the bail consists of a surety bond, to the surety or its designated agent of the action taken by the court. Provided that within seven (7) days of the entry of forfeiture, the court may, for good cause, set aside the forfeiture and reinstate the bail without the consent of the person posting the bail and quash the bench warrant if still outstanding. At the time of such reinstatement, the court shall provide written notice to the person posting the bail, or, if the bail consists of a surety bond, to the surety or its designated agent.

(5) After the court enters the order forfeiting bail, the clerk must within five (5) days, mail a written notice of forfeiture to the last known address of the person posting the undertaking of bail or, if the bail consists of a surety bond, to the surety or its designated agent. If the defendant does not appear or is not brought before the court within one hundred eighty (180) days after the entry of the order forfeiting bail, the clerk, upon receiving payment of the forfeited bail, shall remit such forfeiture to the county auditor for distribution and apportionment as provided by § I.C. 19-4705.

* * * * * * * *

(g) **Exoneration of bail.** When the conditions of bail have been satisfied, or if the clerk fails to mail a written notice to the person posting the undertaking of the bail or, if the bail consists of a surety bond, to the surety or its designated agent within five (5) days of the order of forfeiture, the court shall then discharge the bail, exonerate sureties, and release any cash or property deposited with the court. If the defendant appears or is

brought before the court within one hundred eighty (180) days after the order forfeiting bail, the court shall rescind the order of forfeiture and shall exonerate the bond.